Supreme Court, U.S.
FILED
071027 FEB 5 - 2008
OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

GLENN KAPRELIAN,

Petitioner,

v.

STATE OF NEW HAMPSHIRE,

Respondent.

On Petition For Writ Of Certiorari To The New Hampshire Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the New Hampshire Supreme Court's test in deciding whether there was sufficient corroborative evidence of the defendant's extrajudicial confession conflicts with the rule established by this Court in *Opper v. United States.* 348 U.S. 84, 92 (1954) to establish *corpus delecti*?

PARTIES TO THE PROCEEDING

The petitioner Glenn Kaprelian is an individual who was the defendant in the state court proceedings.

As this was a criminal proceeding, the State of New Hampshire was the prosecuting party.

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REPORT OF OPINION BELOW

On November 9, 2007, the New Hampshire Supreme Court rendered an unpublished opinion in this case. *State of New Hampshire v. Glenn Kaprelian.* It is reprinted in the appendix hereto. The issue for which the petitioner requests certiorari is contained in the opinion, and the relevant facts are stated throughout.

JURISDICTION

The New Hampshire Supreme Court issued its decision in this case on November 9, 2007. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION

The United States Constitution, Amendment VI, provides:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state in which they reside. No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

On November 30, 2006, at approximately 1:11 a.m., a police officer responded to a strip-mall type area in Salem, New Hampshire for a report of a minor motor vehicle accident (Tr. 7-9). There were several businesses in the area, including a pub (Tr. 7). The pub was still open when the officer arrived (Tr. 10, 24) and there were several vehicles in the parking lot (Tr. 8). The officer saw the petitioner standing in the parking lot when he first saw him (Tr. 12). The officer never saw the petitioner driving (Tr. 24).

The petitioner told the officer that he was backing his car up when another vehicle collided with him (Tr. 12). The officer asked the petitioner how many drinks he had (Tr. 24). The petitioner told the officer that he had had two beers when interrogated (Tr. 13). The officer never asked the petitioner when he had the two beers (Tr. 25). The officer also did not ask the petitioner where he had the two beers (Tr. 25, 35).

The officer ran the petitioner through field sobriety testing and testified about an array of mistakes made by the petitioner during the maneuvers (Tr. 22). Facts consistent with normal behavior were the defendant's cooperation with the officer (Tr. 25); his normal dexterity when asked to touch the tip of the officer's pen with the tip of his right index finger (Tr. 26); his ability to follow instructions during the follow-the-pen test (Tr. 27, 30) and a walking test (Tr. 30-32); his ability to stand with his feet together and his arms by his side (Tr. 28); his ability to walk 18

steps without stepping off a line (Tr. 31) and his normal counting (Tr. 31). The officer arrested the defendant and charged him with DWI (Tr. 30). At the police station the defendant refused to blow into a breath tester (Tr. 21).

After a bench trial, at which the arresting officer was the only witness who testified, the Trial Court found the defendant guilty (Tr. 36) and sentenced him to the statutory minimum penalties for a first offense DWI under the relevant New Hampshire statute, RSA 265:82: a nine month loss of his driving privileges, the right to reduce his loss of driving privileges to 90 days upon entry into a DWI program within 45 days, a fine of $500 plus the statutory penalty assessment of $100, and completion of the first offender impaired driver program (Tr. 36).

The petitioner timely filed a notice of appeal to the New Hampshire Supreme Court on March 30, 2007, and on April 11, 2007, that Court accepted the case for review. On appeal to the New Hampshire Supreme Court, the petitioner argued that his uncorroborated statement to the police officer that he drove was insufficient to establish the *corpus delecti* of the crime of DWI. On November 9, 2007, the New Hampshire Supreme Court, in an unpublished opinion, affirmed the petitioner's conviction, Appendix at 1-2.

This petition follows.

REASONS FOR GRANTING THE WRIT

1. The New Hampshire Supreme Court has decided an important question in this case in a way that conflicts with relevant decisions of this Court.

It is well settled that a defendant's "criminal conviction cannot rest entirely on an uncorroborated extrajudicial confession." *United States v. Stephens,* 482 F. 3d 669, 672 (4th Cir. 2007); *Wong Sun v. United States,* 371 U.S. 471, 488-489 (1963). In *Opper v. United States,* 348 U.S. 84, 92 (1954), this Court established a standard for the extent that a confession must be corroborated in order to legally uphold a conviction:

> " . . . the corroborative evidence need not be sufficient, independent of the statements, to establish the *corpus delecti.* It is necessary, therefore, for the government to introduce substantial independent evidence which would tend to establish the trustworthiness of the statement."

(Emphasis provided).

Here the trial record is nearly void of any independent corroborative evidence. Appendix pp. 3 et seq. The *Opper* Court defined the dual function of the corroborative evidence as follows:

> " . . . Thus, the independent evidence serves a dual function. It tends to make the admission reliable, thus corroborating it while also establishing independently the other necessary

> elements of the offense. . . . Those facts plus the other evidence besides the admission must, of course, be sufficient to find guilt beyond a reasonable doubt."

Opper, 348 U.S. at 93.

The New Hampshire Supreme Court has developed its own rule regarding corroborative evidence necessary to corroborate a defendant's extrajudicial confession that does not serve the dual function set forth in *Opper*. In *State v. George*, 257 A. 2d 19 (N.H. 1969), the New Hampshire Supreme Court established its own one-pronged rule, namely:

> "Logically therefore, there need be only sufficient corroboration to indicate that the confession or admission is trustworthy. This does not require proof of the crime by evidence independent of the confession or admission. It does require substantial independent evidence indicating that the admission of the defendant is true.

State v. George, 257 A. 2d at 21.

The New Hampshire Supreme Court assays only the trustworthiness of the confession, and ignores the second function of the corroborative evidence set forth in *Opper*, namely the corroborative evidence's importance in the independent establishment of the elements of the offense. In this case there was no independent witness who saw the petitioner drive. The petitioner's statement that he drove further lacks reliability because the police officer testified that the

petitioner was allegedly intoxicated. Thus in this case, the evidence was the petitioner's uncorroborated, and by the police officer's opinion, alcohol-impaired, extrajudicial confession that he drove a motor vehicle upon which the New Hampshire state Courts sustained the petitioner's conviction.

The New Hampshire Supreme Court's decision and standard in reviewing corroboration of extrajudicial statements of defendants in this case and others conflicts with this Court's well-settled standard established in *Opper v. United States,* and this Court should accordingly grant certiorari.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

Petitioner Glenn Kaprelian, by

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In The
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APPENDIX TO PETITION

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case. No. 2007-0216, *State of New Hampshire v. Glenn Kaprelian,* the court on November 9, 2007, issued the following order:

Having considered the brief, memorandum of law and record submitted on appeal, we conclude that oral argument is unnecessary for the disposition of this appeal. *See Sup. Ct. R.* 18(1). We affirm.

The defendant, Glenn Kaprelian, appeals his conviction for driving while intoxicated. He argues that the trial court erred in fording him guilty beyond a reasonable doubt where the only evidence that he drove was his uncorroborated statement to the arresting officer and that even if he drove, the State failed to prove that he was intoxicated when he did so.

To prevail in a challenge to the sufficiency of the evidence, the defendant bears the burden of proving that no rational trier of fact, viewing the evidence in the light most favorable to the State, could have found guilt beyond a reasonable doubt. *See State v. Crie,* 154 N.H. 403, 406 (2006). In reviewing the evidence, we examine each evidentiary item in the context of all the evidence, not in isolation. *See id.* Circumstantial evidence may be sufficient to support a finding of guilty beyond a reasonable doubt. *Id.* Further, the trier of fact may draw reasonable inferences from facts proved and also inferences from facts

found as a result of other inferences, provided they can be reasonably drawn therefrom. *See id.*

In this case, the arresting officer testified that he was dispatched to the scene of a minor motor vehicle collision at 1:11 a.m. He first saw a car that was not parked in a parking space and a female "obviously, waiting for the police to arrive." After the officer spoke to her and observed the damage on her car, she pointed out the defendant who was standing next to a vehicle with minor damage to its bumper. The defendant described the accident, admitting that he had been driving.

To be sufficiently corroborated, there must be evidence that a defendant's statement is trustworthy, *State v. Hanley,* 116 N.H. 235, 237 (1976). This does not require proof of the crime by evidence independent of the confession or admission but rather substantial evidence indicating that the admission of the defendant is true. *Id.*

The accident, the location of the defendant next to one of the damaged cars and the first driver directing the arresting officer to him combined with the defendant's statement provided sufficient evidence to conclude that his statement was trustworthy and that he drove the car.

The defendant also argues that the State failed to prove that he was intoxicated before he drove. He contends that because he was standing adjacent to a bar that was still open, the evidence could not exclude that he consumed alcohol after the accident. The

arresting officer testified that the defendant had advised him that the accident had happened just minutes before the officer arrived; the officer also testified that the bar should be closed by 1:30 a.m. Given the position of the cars and the fact that both drivers were in the proximity of those cars when the officer arrived, as well as the statutory prohibition against serving alcohol after 1:00 a.m., *see* RSA 179:17 (Supp. 2007), we conclude that viewed in the light most favorable to the State, the evidence was sufficient to support the defendant's conviction. *See State v. Cobb*, 143 N.H. 638, 658 (1999) (proper analysis is not whether every possible conclusion has been excluded, but, rather, whether other rational conclusions based upon the evidence have been excluded).

Affirmed.

Broderick, C.J., and Dalianis, Duggan, Galway and Hicks, JJ., concurred.

Eileen Fox,
Clerk

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THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS SALEM DISTRICT COURT

2007

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THE STATE OF NEW HAMPSHIRE	*	06-CR-5222
	*	2007-0216
v.	*	
	*	
GLENN KAPRELIAN	*	

* * * * * * * * * * * * * * * * *

TRANSCRIPT OF PROCEEDINGS

TRANSCRIPT OF HEARING, DIGITALLY RECORDED AT THE DISTRICT COURT, SALEM, NEW HAMPSHIRE, ON MARCH 5, 2007, BEFORE THE HONORABLE JOHN A. KORBEY, PRESIDING JUSTICE.

APPEARANCES:

For the State:	Robert H. Prince, Esquire
For the Defendant:	Mark L. Stevens, Esquire
Court Monitor:	Sherry L. Bisson
Transcriber:	Carol A. Perry

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[3] THE COURT: Let's see. We have a complaint that charges Mr. Kaprelian [Ka-prel-ee-an] – did I pronounce that correctly, sir?

THE DEFENDANT: Yes.

THE COURT: – with a Class-B misdemeanor of driving while intoxicated. The State may proceed.

MR. STEVENS: Your Honor, may I just make an oral motion to sequester witnesses? I think the State has two witnesses in this case.

THE COURT: Sure.

MR. PRINCE: Well, actually, the State only has one witness at this point. The other witness hasn't arrived, and –

MR. STEVENS: If she did show up, though, judge, I just ask that she be sequestered.

THE COURT: I don't know how we know who she is, that's my problem. If she walks in the courtroom, I don't know who she is.

MR. PRINCE: I checked. I really don't think she's gonna be here. May we approach, your Honor, briefly?

THE COURT: Sure.

[The following is a discussion at the bench].

MR. STEVENS: . . . in the court how you would like [4] us to do this or put it on the record. This case is dealing with a minor, low-speed accident, and I had hired an accident reconstructionist and he formed the opinion that, apparently, the defendant was not at fault. And I think we agree that that's not an issue, that we stipulate that the car that the defendant was in was not at fault for the accident.

MR. PRINCE: The other lady . . . [inaudible].

MR. STEVENS: [Inaudible – two people speaking at once].

MR. PRINCE: . . . like a small fender bender. I've read the report that he has issued. I mean, it's a reasonable assumption.

MR. STEVENS: We don't stipulate to operation, though.

MR. PRINCE: Yeah.

MR. STEVENS: We would stipulate that this car was not involved in the accident.

THE COURT: I'll take notice of that, for the record.

MR. STEVENS: Sure.

[End bench conference].

MR. PRINCE: State calls Robert Morin to the stand. Please, raise your right hand.

[5] ROBERT R. MORIN, JR., STATE'S WITNESS, SWORN

DIRECT EXAMINATION

BY MR. PRINCE:

Q Please, be seated.

A Thank you. State your name, spelling your last name, for the record. Robert R. Morin, Jr. M-o-r-i-n.

Q How are you employed, sir?

A As a police officer for the Town of Salem.

Q How long have you been a police officer for the Town of Salem?

A I'm in my third year.

Q Prior to that, were you a police officer in any other jurisdiction?

A Yes. I was a police officer in Dover, New Hampshire, for five years and Newton, New Hampshire, prior to that for two years.

Q Okay. And you're a graduate of the New Hampshire Police Academy?

A Yes, I am.

Q And during the time you were with the – at the academy, did you receive any instruction in the detection and apprehension of DWI offenders?

A Yes, I did.

Q And have you received any kind of specialized [6] training since that time, or during that time?

A Yes. In addition to the standard block of instruction that you receive at the academy, I'm, also, a standardized, field-sobriety test instructor, a drug-recognition expert, as well as a drug-recognition expert instructor.

Q Did you receive any instruction in what's commonly known as the HGN?

A Yes, I have.

Q All right. And how many times would you say just – would you have used these – the field-sobriety testing during your experience as a police officer?

A Thousands.

Q Okay. And you do it the same way all the time?

A Yes, I do.

Q Now, I'm drawing your attention to the 23rd of November of last year at approximately 01:11 hours. Is that military time?

A Yes, it is.

Q All right. Were you so employed on that date?

A Yes, I was.

Q And you were on patrol?

A Yes.

Q Did you have occasion to respond to 326 South [7] Broadway?

A Yes, I did.

Q And what's that – what kind of an area is that?

A It's kind of like a strip mall, if you will. There's several businesses in that particular development.

Q Okay. And is that where Maggie Mae's Pub is located?

A Yes, it is.

Q Okay.

MR. PRINCE: At this time, your Honor, the State would ask the Court to take judicial notice that the 326 South Broadway area is a way.

MR. STEVENS: Your Honor, I don't know if the 326 Broadway area is a way. I don't object to South Broadway deemed to be a way. I don't think that there's been any testimony that the defendant was driving on South Broadway, yet, but I don't object to South Broadway being – defining that South Broadway's a way.

THE COURT: Is a way. Okay.

BY MR. PRINCE:

Q Well, this area that you responded to, that's the address?

A Yes, it is.

Q All right. And during the time you've been [8] employed, here, in the Town of Salem, this area, is this open to the public?

A Yes, it is.

Q Is there any time that it's been closed to the public?

A No.

Q And during the time you've been employed, have you noticed vehicles in that area at various times of the day?

A Yes, I have.

Q All right. And this is the parking lot, here, at 326?

A That is correct.

Q Now, when you responded there, when you arrived, how many vehicles were in that parking lot?

A Several.

Q When you say several, two, three, four, five?

A Probably more in the lines of approximately 20.

Q Okay. At this time of day?

A Yes.

Q And is this area fairly well lit?

A Yes, it is.

Q Okay. So when you arrived, what did you – why did you go there?

A I was dispatched to a minor motor-vehicle [9] collision in the parking lot.

Q Okay. And when you arrived, what did you see? How many vehicles did you observe besides the 20 that you were looking – that you were looking for?

A There were two vehicles that I ended up making contact with. The first vehicle that I observed was parked towards the entrance of the pub.

Q Okay. Officer Morin, I'd like you to go to the board, if you would, and just do kind of a diagram of this area you're talking about, and indicate – I understand you've testified to 20, or so, vehicles, but if you could recall where these particular two vehicles were located and mark that area, if you would.

A [Witness complies].

Q Okay. Was that the position of the two vehicles when you arrived?

A Yeah. Obviously, not to scale. This is South Broadway. This area would be the parking lot. The first vehicle was parked towards – closer towards the

business. The second vehicle was parked in a parking spot near the exit.

Q Now, when you say vehicle number one, where's the front of the vehicle?

A The front of the vehicle would be pointing –

[10] Q Okay.

A – on South Broadway.

Q How about the second vehicle?

A The second vehicle was pulled into the spot.

Q Okay, like that?

A Yeah.

Q And is that how the parking spaces are in that area?

A Yeah, in that particular – as – there's parking spots that go along, and there's – obviously, this way, but this particular parking space the vehicle was pulled up.

Q Okay. Now, besides Maggie Mae's Pub, what kind of other businesses are in that area?

A There's a convenience store. There's a little jewelry store; several businesses in that strip mall.

Q How many were open, at that time?

A Just Maggie's.

Q Okay. So when you arrived, did you see any people standing around?

A My attention was drawn to this vehicle, because it wasn't parked in a spot. The person was, obviously, waiting for the police to arrive –

Q Okay.

[11] A – at that location.

Q And was that a man or a woman?

A It was a female.

Q Okay. Did you see anybody else?

A Not at that particular time, but after I spoke to her, she pointed somebody out to me.

Q Okay, but in terms of what, if anything, unusual did you observe about these vehicles?

A This vehicle had a large dent in the rear quarter panel of her vehicle.

Q In the rear quarter panel?

A Rear quarter panel. [Inaudible].

Q Okay. And how about number two?

A After I contacted the first subject, when I went over, there was minor damage to the bumper, I believe.

Q Okay. You can resume your seat.

A Thank you.

Q Do you recall what type of vehicles they were?

A Vehicle number one was a Chevy Cavalier, color black. Vehicle number two was a Toyota Tacoma, color blue.

Q Okay. Now, when you went over to vehicle number two, who, if anyone, did you see?

A I contacted Mr. Kaprelian, who's seated at the [12] defense table.

Q Okay. Are you indicating the defendant, here?

A The gentleman in the blue shirt and blue tie.

Q Where was he standing?

A He was standing next to his vehicle.

Q Okay. And did you make any inquiry of him?

A Yes, I did.

Q And what was the nature –

THE COURT: I'm going to stop you for a second. You said the defendant was standing next to his vehicle. Is that vehicle number two?

THE WITNESS: Yes, sir, it is.

THE COURT: Thank you.

BY MR. PRINCE:

Q And did you make any inquiry of him, at that time?

A Yes, I asked him to tell me what had happened.

Q Okay. Did he do that?

A He did.

Q And what did he tell you?

A He told me that he was backing out of the parking spot, looked behind him, didn't see anybody coming, and that vehicle number one, which he had admitted that he collided with, must have flown into the parking lot, because he didn't see her.

[13] Q Okay. Now, how close to him were you when you were talking with him?

A Four feet.

Q Did you make any observations of his person, at that time?

A Yes, I did.

Q And what were the nature of those observations?

A I was able to detect an odor of an alcoholic beverage coming from his breath. I noted that his eyes were bloodshot and glassy, speech was slurred, and he was unsteady on his feet.

Q Okay. At that point, did you ask him whether he had anything to drink?

A Yes, I did.

Q And how did he respond?

A He acknowledged that he had two beers.

Q Okay. Now, based on your observations of the defendant and what you'd seen, did you ask him to do anything?

A I asked him if he'd be willing to perform some field-sobriety tests.

Q And how did he respond?

A He acknowledged that he would.

Q Okay. So what was the first test that you – that [14] you performed?

A Horizontal-gaze nystagmus.

Q And, again, you've done this how many times, perhaps?

A In my career, thousands.

Q And you've done it the same way?

A Yes.

Q Tell us how you do this test.

A I use my pen as a stimulus, ask him if he's able to see my pen, which I hold approximately 12 inches in front of his face. If the subject acknowledges that he can see my pen, I ask him if he has any problems with his vision. In this case, Mr. Kaprelian stated that he hadn't. I asked him, then, to reach out with his right index finger to touch the tip of my pen

so that I can be sure that he can see the stimulus that I'm referring to. Mr. Kaprelian was able to perform that test. I instruct the subject that I will be moving the pen from side to side, and tell him to follow it with the – follow the tip of the pen with his eyes while keeping his head stationary.

Q What are you looking for when that's happening?

A There are three clues, a total of six, for – obviously, you have two eyes. The first is lack of smooth [15] pursuit; the second is distinct and sustained nystagmus at maximum deviation; and the third is early onset of nystagmus prior to 45 degrees.

Q And, in this particular case, what did you do, what did you see?

A Well, the first thing I do is I check pupil size to make sure they're equal, and make sure that his pupils are tracking equally.

Q And were they?

A Yes, they were.

Q Okay.

A I observed all six clues for HGN, lack of smooth pursuit, distinct and sustained nystagmus at maximum deviation, and early onset in both eyes.

Q What does that indicate to you, based on your training and experience?

A That there's possibly an impairment issue.

Q What was the next test you did?

A Walk and turn.

Q And you've done this test before?

A Yes, I have.

Q You do it the same way?

A Yes, I do.

Q Now, do you explain this to the person?

[16] A Explain and demonstrate.

Q Okay. And did you do that, at this particular time?

A Yes, I did.

Q Did he indicate whether he had any problems understanding?

A He stated that he understood the test. He, also, advised me that he didn't have any injuries or illnesses which would preclude him from performing the test.

Q Did you ask him that, specifically?

A Yes, I did.

Q So in this area that he was doing the test, I know you've testified at Maggie Mae's Pub in this parking lot, what type of area – is this flat, hilly, or what?

A It's a flat area, free of debris and it was illuminated by not only the cruiser spotlight, but parking lot lights, as well.

Q So how did he do in this particular test? Would you tell us?

A He was unable to keep his balance in the instructional position. He missed heel to toe by greater than a half inch five times on his first nine steps; did not complete the turn as I demonstrated it; missed heel to toe eight times on the second nine steps and held his arms [17] greater than six inches from his sides throughout the test.

Q What did that indicate to you, based on your training and experience?

A That there was several clues indicating possible impairment.

Q Was that the only test you did –

A No.

Q – besides HGN?

A No, there was one more.

Q What was that?

A One-leg stand.

Q Okay. And, again, did you explain it and demonstrate it?

A Yes, I did.

Q And did he indicate whether he understood?

A He stated that he understood.

Q Okay. Tell us what you asked him to do.

A I instructed him to stand with his heels and toes together, his hands down by his side. As I'm demonstrating the test, I tell him what – what I tell him to do, I want him to take whatever foot he's comfortable with, right or left, doesn't matter to me, and lift it six inches off the ground, and give him a visual indicator of [18] what six inches is with my hands. I have him lift his foot off the ground, and I tell him to point it so it's parallel to the ground, advise him that his leg will be straight, he'll be looking at his toe, and begin to count in the fashion of one one thousand, two one thousand, three one thousand, four one thousand, to continue to count in that fashion until I tell him to stop. If, at any time during the test he should put his foot down, just pick it up and continue to count from where he left off.

Q How did he do?

A He put his foot down on the count of one and five. He hopped to the side to maintain his balance, and he held his arms greater than six inches from his side throughout the test.

Q Is that how you told him how to do it?

A That is not how I told him to do it.

Q Okay. Well, based on your – the totality of your observations of the – of the area, your totality of

the – of your observations of Mr. Kaprelian and how he performed on the test, did you form an opinion as to whether he was impaired?

A Yes, I did.

Q And what was that opinion?

A I concluded that he was impaired and unable to [19] operate a motor vehicle safely.

Q And what did you do?

A I placed him under arrest for DWI.

Q And, at that point, where did you take him?

A I secured him in handcuffs and escorted him to the – to my cruiser.

Q Now, you – what time did you come on duty that night?

A Midnight.

Q Okay. And when you went in your car, was there any unusual odors, at that time?

A No, there wasn't.

Q And after you had Mr. Kaprelian in your vehicle and you transported him, what, if anything, did you notice?

A I was able to detect an odor of an alcoholic beverage coming from the back seat.

Q Okay. Now, I assume you arrived at the police department within a reasonable time?

A Yes, I did.

Q Now, what is your particular procedure when you have a case like this and you arrive at the police department, what's the – what is one of the first things you do in terms of given this particular arrest?

[20] A Well, the very first thing I do when I bring them is to search and make sure he doesn't have anything on him that's gonna harm me or anybody else, take his handcuffs off. I believe what you're asking is the next thing I do is read him the administrative license suspension form.

Q Correct. And I know officers do it differently. How do you do it?

A I read him each line verbatim. I put a check mark at the end of the line.

Q Did you do that in this instance?

A Yes, I did.

MR. PRINCE: May I approach, your Honor?

THE COURT: Yes.

BY MR. PRINCE:

Q Officer Morin, I show you this document and ask if you recognize what it is.

A Yes, I do.

Q And what is it?

A This is the ALS form that we read to Mr. Kaprelian on the night of his arrest.

Q How do you know?

A Because it's dated that, and my signatures on it, his name.

Q Okay. And does – the questions that are on [21] there, those are questions you ask him?

A Yes.

Q Okay. And did you make any marks on it?

A Put a check mark at the end of each sentence.

Q And did he indicate whether he understood after each question was asked?

A Yes, he signed line number seven indicating that he'd been informed of his rights.

Q Okay. And at the conclusion of that, did you ask him to take a test?

A I asked him to perform the breath test.

Q And what did he say?

A He declined.

Q And he indicated any declination on this document?

A Yes, he did. He checked the "I refuse the requested testing" and then signed his name.

Q How do you know he signed his name?

A It's right there on the form, and I observed him do it, plus I witnessed it and signed it.

MR. PRINCE: At this time, the State would ask the Court to submit this as evidence.

MR. STEVENS: No objection.

[State's Exhibit No. 1, ALS form, received in evidence].

BY MR. PRINCE:

[22] Q Anything else unusual, at that point, after you read – he declined the test?

A No. We continued with the booking process. He developed some mood swings. He was a little surly.

Q Other than that –

A No.

Q – nothing unusual? All right.

MR. PRINCE: State has nothing further, your Honor.

CROSS-EXAMINATION

BY MR. STEVENS:

Q Good morning, officer.

A Good morning.

Q Officer, you've done thousands of sets of field-sobriety tests, right?

A I'm sorry?

Q You said you've done thousands of –

A Yes.

Q – batteries of field-sobriety tests? You've made, quite a few arrests?

A Yes.

Q During your training at the – at the police academy, did you receive any training in report writing?

A Yes.

[23] Q And why do you write reports?

A To document the incident.

Q Okay. Do you use reports to help you refresh your recollection before you testify?

A Sure.

Q Is that part of the reason that you write them?

A Yes.

Q Did you write a report in this case?

A Yes, I did.

Q Did you review your report before you testified today?

A Yes, I did.

Q Did you include, in your report, everything that was relevant to impairment as far as the defendant goes?

A I believe I did, yes.

Q And during your training in report writing, were you trained to write down the time that an incident occurs at?

A I'm sorry?

Q Were you trained to write down the time that you respond to an incident?

A No, it's usually on the CAD system dispatch, it's not . . .

Q Okay. Would you agree that you didn't write down [24] what time you got to the location of this accident?

A I would agree that it's not in my narrative. It's probably in the report in some other area.

Q Okay. All right. Would you agree that you didn't see Mr. Kaprelian driving?

A Yes, I would agree to that.

Q And when you got to the scene, when you got to that parking lot, he wasn't operating his car?

A That is correct.

Q You didn't see how many people were in the defendant's car at the time of the accident?

A No, I did not.

Q You asked him how many drinks he had, right?

A Yes, I did.

Q Was the – was the establishment that he was at, there, Maggie Mae's, was that still open when you got there?

A Yes.

Q And you testified you got there at 1:11?

A I believe that's the time that's indicated on the dispatch notes, yes.

Q Okay, but you don't have any independent recollection of what time you got there?

A I don't. It was still open, so . . .

[25] Q Okay. Do you know what time it closes?

A They should have everybody out by 1:30, yes.

Q Okay. And your report doesn't indicate that you asked Mr. Kaprelian what time he had those two beers. Do you recall –

A No, I did not.

Q You didn't ask him?

A I did not, no.

Q You didn't ask him where he had the two beers?

A No, I didn't.

Q When you asked Mr. Kaprelian to do the field-sobriety tests, was he cooperative with you?

A Yes, he was.

Q He agreed to do everything you asked him to do out at the roadside?

A Yes, he did.

Q Before you do the – the HGN test that you described, do you do anything to make sure that he can see the pen?

A Yes.

Q What do you do?

A I hold the pen approximately 12 inches from his face, and then I check for equal tracking – or tracking and equal pupil size.

[26] Q Do you ask him to reach out and touch the tip of the pen?

A Yes, I do.

Q How do you do that? What exactly did you ask him to do?

A I tell him with his right index finger to reach out and touch the tip of the pen with the tip of his right index finger.

Q Okay. And when you asked Mr. Kaprelian to do that, did he use the correct hand?

A Yes, he did.

Q Did he use the correct finger?

A Yes, he did.

Q Did he touch the tip of the pen with the tip of his finger?

A Yes, he did.

Q And if he doesn't do that, you'd make a note of that in your report?

A I would indicate that he had trouble with that, yes.

Q Okay. When – when he does the HGN test, does he have to hold his head still for that, to do it properly?

A The head needs to be still, follow it with your eyes.

[27] Q Okay. So you tell him to hold his head still, right?

A Stationary, yes, sir.

Q And then follow the pen with just his eyes?

A Correct.

Q Did he do that?

A He did.

Q How do you tell him to stand for the HGN test?

A With his feet together and hands by his side.

Q Okay. How long did the HGN test last?

A I don't have a – again, I'm focused on my observations, so I don't know, exactly. I'm not watching my watch. I'm looking at his eyes.

Q Okay. How long does it take for each – each time you wave the pen, how long does that take?

A When I'm checking for lack of smooth pursuit, it's two-seconds. When you're checking for distinct and sustained, it's four seconds.

Q Okay. And how about the third thing, the onset-prior-to-45-degree business, how long does that take?

A If you see the onset prior to 45 degrees, you hold your pen at that angle to make sure you're seeing it, and then you continue along.

[28] Q How many times do you do each one of those there things?

A Each eye is tested twice.

Q Okay. Twice for each of the three things?

A That is correct.

Q And then you did something at the beginning to determine the equal tracking, right?

A That is correct.

Q How many times do you do that?

A Just one sweep back and forth, make sure the eyes are following.

Q All right. And throughout all that, did he stand the way that you told him to stand?

A Yes, he did.

Q Feet together?

A Yes, he did.

Q Arms by his side?

A That is correct.

Q Kept his head still?

A Yes.

Q Didn't have to wave his arms for balance?

A No, just had a circular sway.

Q He had a circular sway?

A Yes.

[29] Q Did he keep his feet in position?

A Yes.

Q Did he keep his head in position?

A Yes.

Q So just the middle of his body –

A No, kind of the whole –

Q – went in a circle?

A – his whole – his whole core was a circular sway.

Q Just the core?

A Yeah.

Q I won't do it.

A Thank you.

Q You're welcome. But he managed to hold his head still and just watch the pen, right –

A That is correct, yes.

Q – while you were doing this? Okay. Now, you need to keep the pen 12 to 15 inches away from his face the whole time, right?

A Yes.

Q Did you have to adjust it, in any way, to compensate for the circle he was doing?

A No.

Q So he followed the instructions for the HGN test, [30] right?

A He did, yes.

Q When you – and the next thing you did was the walk-and-turn test?

A Yes.

Q Did he – you give a demonstration for that test, right?

A Yes, I do.

Q And do you tell him don't start until I tell you do [sic]?

A Yes.

Q Did he start at the appropriate time?

A He did.

Q That's something you're trained to look for if he doesn't do it right?

A Correct.

Q Did he take the correct number of steps?

A He did.

Q Nine out, nine back?

A That is correct.

Q And that's something you're trained to look for, too, isn't it?

A Yes.

Q Did he ever stop walking during the walk-and-turn [31] test?

A To maintain his balance, no.

Q Okay. And that's something you're trained to look for, too, right?

A Yes.

Q Did he ever step off the line?

A No, he didn't.

Q Okay. All 18 steps were on the line?

A Yes.

Q Did he count his steps out loud?

A I believe he did.

Q Did he make any counting mistakes?

A I – I don't recall that he did. It's not a validated clue, so I don't pay as much attention to that.

Q Okay. If he messes up the count, though, wouldn't you put it in your report?

A No.

Q Okay.

A Probably not.

Q But you tell him to do it out loud, right?

A Yes.

Q And if he does it out loud, if he counts properly, he doesn't get any credit for that in the scoring system?

A No. It's a divided attention, so you're trying to [32] get him to focus on two things at one time. That's the purpose of the test, but it's not a validated clue, so it may be an indicator, but it's not a clue.

Q Okay. So when you tell him to – to count nine steps out and count nine steps back, that's not part of dividing his attention?

A Yes, it is. He has to take the right number of steps.

Q Uh-huh.

A But if he doesn't count them out loud, or loud enough so I can hear them –

Q That part doesn't matter for some reason?

A It's – it's not a validated clue.

Q Okay.

A It's not one of the clues.

Q What do you tell him to look at while he's doing that?

A Look down at his feet.

Q Did he do that?

A He did.

Q After he – he made the turn after the end of the first nine steps, was he facing the appropriate direction?

A He was.

Q He didn't stop and ask you any questions, what [33] he's supposed to do next?

A He didn't perform the – the turn, as demonstrated, but he was facing the right direction.

Q What did he do, did he spin?

A Yeah, he kind of did a pirouette type of thing.

Q Okay. And after the pirouette, though, he just proceeded on and to – completed the ordeal in the other direction?

A He did.

Q What kind of shoes was he wearing for the walk-and-turn test, if you recall?

A I believe he was wearing sneakers, but I don't recall, specifically, what brand, or color, or anything like that. That would be in my report.

Q Okay. If I could ask you to take a look at this, maybe it would refresh your memory.

A It's not in the narrative portion.

Q Okay. You didn't write it in here?

A No.

Q Okay.

A It would be in the defendant-arrestee portion.

Q Okay.

A Descriptive.

Q Did you. ask him to take – and you said you [34] received lots of training in DWI and DRE. Are you trained to operate an Intoxilyzer machine?

A Yes, I am.

Q Are you trained to operate the little hand-held PBT devices?

A Yes, I am.

Q Did you ask Mr. Kaprelian if he'd take a PBT test?

A No, I did not.

Q You started your shift at midnight, you said?

A Yes, I did.

Q And by the time you got to that parking lot, the two people had been in the accident, neither of them was – was driving, right?

A The subject in vehicle number one was sitting in the car, but not operating the vehicle.

Q Okay. The subject in vehicle number one, but not him, right?

A That is correct.

Q Okay. You don't have any – any direct, independent knowledge of what time the accident happened?

A According to Mr. Kaprelian's statement, it happened just minutes before my arrival.

Q Okay. You didn't write that in your report anywhere, did you?

[35] A No.

Q Okay. Just remembering it now?

A What's that?

Q You're just remembering it now?

A Well, you just asked me that question. I didn't feel it was relevant to the case, but you're asking, so I'm telling you.

Q You didn't feel the time of operation was relevant?

A No, he told me that he was backing out of the parking lot, and the vehicle had, obviously, flown in, he didn't see it, and crashed into it.

Q Okay. You don't know what time he had the beers, right?

A No, I don't.

MR. STEVENS: Okay. No further questions.

MR. PRINCE: Nothing further from the State.

THE COURT: You may step down, sir.

THE WITNESS: Thank you.

MR. PRINCE: The State has no other witnesses. State rests.

MR. STEVENS: Defendant rests, your Honor.

THE COURT: Anything further from either party?

MR. PRINCE: Nothing from the State.

[36] MR. STEVENS: Can I just be heard, briefly, your Honor?

THE COURT: Sure.

MR. STEVENS: Your Honor, the issue is whether the defendant was impaired at the time of operation, and I would suggest that the State has not proved either that he operated, beyond a reasonable doubt, or that he was impaired at the time of operation, beyond a reasonable doubt. The only evidence of any operation, at all, is the single, uncorroborated statement of the defendant. The officer didn't observe him driving. Doesn't know what time he drank the beers. He's outside in the parking lot of an establishment that serves drinks that's still open. The state cannot exclude all other inference besides guilt, and I'd ask you to find him not guilty.

THE COURT: Mr. Kaprelian, based on the testimony presented this morning, the Court makes a

finding of guilty. Does the State have a motor-vehicle record?

MR. PRINCE: Yes, your Honor.

[Pause in proceedings].

THE COURT: Mr. Kaprelian, the Court orders a fine of $500.00 and the revocation of your license for a period of nine months, which you have the right to reduce to 90 days if you apply for the alcohol-awareness program [37] within 45 days. You need to have a seat in the waiting room right across the hall, and the clerks office will call your name in a few minutes. Mr. Stevens, thank you.

[Hearing concluded at 10:03 A.M.].